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MOTHERS, MYTHS, AND THE LAW OF DIVORCE: ONE MORE FEMINIST CASE FOR PARTNERSHIP

CYNTHIA LEE STARNES*

*What was once thought can never be unthought.*¹

Since the early days of no-fault divorce, family law has embraced a vision of marriage as a companionate relationship in which spouses make equal or similar contributions to work and home.² Grudgingly, the law has begun to concede that this egalitarian model is sometimes more aspirational than real. Traditional marriages still exist, and when they fail after many years, equity often demands a remedy not contemplated by no-fault's clean-break philosophy.³ Also inconsistent with an egalitarian model are the many quasi-traditional marriages in which two wage-earning spouses divide domestic responsibilities along gender lines in ways that, over time, reduce a mother's earning capacity.⁴

The disconnect between a normative model of egalitarian marriage and *real* marriage was made startlingly clear in a recent study by Virginia sociologists Bradford Wilcox and Steven Nock. Expecting to find that women were happiest in marriages marked by egalitarianism,⁵ the researchers instead found that women, including those with egalitarian beliefs about marriage, were happiest in marriages marked by traditional gender roles.⁶ While the explanation for this finding is unclear, the finding itself undercuts the law's marriage

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1. FRIEDRICH DÜRRENMATT, *THE PHYSICISTS* 92 (James Kirkup trans., Grove Press, Inc. 1964) (1962).

2. In an egalitarian (companionate) marriage model, "spouses share similar work and family responsibilities" and patriarchal authority is eliminated. W. Bradford Wilcox & Steven L. Nock, *What's Love Got to Do with It? Equality, Equity, Commitment and Women's Marital Quality*, 84 SOC. FORCES 1321, 1322 (2006).

3. SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* 162-63 (1989).

4. For a discussion of the reduction in earning capacity associated with motherhood, see *infra* Part II.A.

5. Wilcox & Nock, *supra* note 2, at 1323. For an interesting commentary on this study, see John Tierney, *The Happiest Wives*, N.Y. TIMES, Feb. 28, 2006, at A19 (suggesting that women do more housework than men partly because housework is more important to women).

6. Wilcox & Nock, *supra* note 2, at 1328, 1332 (finding support for the hypothesis that even wives with egalitarian attitudes "will be happier in marriages with gender-typical practices"); see also *id.* at 1340 ("... [W]omen are not happier in marriages marked by egalitarian practices and beliefs.").

model. If even egalitarian-minded women are assuming and taking comfort in gender-based roles within their own homes, the law's equal-contribution model of marriage has it wrong. The point, of course, is not that egalitarian marriage is a bad idea. To the contrary, marriages in which spouses actually match the hours and energy they devote to market and family work signal an abandonment of gender-determinative roles that has long been the goal of many feminists.⁷ The problem, however, is that conflation of aspiration and reality establishes a fictional baseline of appropriate behavior against which legal actors judge real spouses, often unsympathetically.

Reexamination of the egalitarian model of marriage begins with identification of three myths that support it. These myths⁸ are simple enough: *mothering just happens*, *mothering is free*, and *mothering*

7. *Id.* at 1322.

8. These myths are recognizable themes in The Great Mother Archetype of Jungian fame, a point made clear to me in a conversation with Alden Josey. Telephone interview with Alden Josey, Jungian analyst, (Feb. 2002). For a sample of Josey's work, see Alden Josey, *Burn in Water, Wash in Fire: Paradox and Ambiguity in the Work of Individuation*, in MIRRORS OF TRANSFORMATION 3 (Dolores Elise Brien ed., 1995). For more on The Great Mother Archetype, see generally ERICH NEUMANN, THE GREAT MOTHER (Ralph Manheim trans., Princeton University Press 2d ed. 1963) (1955).

A very different kind of myth about mothers is described in SUSAN J. DOUGLAS & MEREDITH W. MICHAELS, THE MOMMY MYTH: THE IDEALIZATION OF MOTHERHOOD AND HOW IT HAS UNDERMINED WOMEN (2004). Douglas and Michaels are concerned about the rise of the "new momism:"

the insistence that no woman is truly complete or fulfilled unless she has kids, that women remain the best primary caretakers of children, and that to be a remotely decent mother, a woman has to devote her entire physical, psychological, emotional, and intellectual being, 24/7, to her children. The new momism is a highly romanticized and yet demanding view of motherhood in which the standards for success are impossible to meet.

Id. at 4. The myth Douglas and Michaels describe burdens real mothers by demanding that they become impossible figures of perfect motherhood. The myths described in this article, by contrast, are myths that prevent observers from seeing real mothers as they actually are.

9. This article assumes the broadest definition of "mothering." Mothering thus includes both direct care of children and more tangentially related activities that maintain the home in which children live. Under this definition, mothering thus includes "physical care; playing with children; reading to children; assistance with homework; attending children's events; taking care of children's health care needs; and dropping off, picking up, and waiting for children." BUREAU OF LABOR STATISTICS, U.S. DEPT OF LABOR, USDL No. 05-1766, AMERICAN TIME-USE SURVEY, TECHNICAL NOTES (2004) (defining primary childcare). Mothering also includes Katharine Silbaugh's description of housework: "preparing meals, washing dishes, house cleaning, outdoor tasks, shopping, washing and ironing, paying bills, auto maintenance, driving . . . making coffee, feeding the baby, emptying garbage, answering the telephone, planning family activities, making beds, caring for pets, weeding, sweeping floors . . . putting clothes away." Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 11 (1996-97).

Mothering need not be gender specific, i.e., a father could (and many fathers do) undertake mothering. As Sara Ruddick has observed, "a child is mothered by whoever

is for babies. Each of these myths has an innocent, child-like quality that contributes to its seductiveness. Yet these myths are far from harmless. Taken together, they ensure that the daily realities of mothers' work, the economic consequences of that work and its value do not receive serious attention. Myth thus conveniently casts divorcing mothers and fathers as equally positioned at divorce, a posture consistent with the premise of egalitarian marriage, which then justifies the economic clean-break philosophy of no-fault divorce.¹⁰ For real women who have lost earning capacity because of family responsibilities, mother myths pose great danger, threatening to seduce even fair-minded judges into distorted notions of equity.¹¹

protects, nurtures, and trains her." Sara Ruddick, *Thinking Mothers / Conceiving Birth*, in REPRESENTATIONS OF MOTHERHOOD 29, 35 (Donna Bassin et al. eds., 1994). As women are overwhelmingly the primary caretakers of children, this article focuses on women. See *infra* Part I.A. Reserved for another day is the possibility that fathers, like mothers, are subject to father myths that undercut their work in the family.

10. See generally OKIN, *supra* note 3, at 161-63.

11. In our hugely discretionary divorce regime, individual trial courts are typically directed by statute to achieve economic equity by dividing marital property and awarding alimony in a way that seems fair. The Uniform Marriage and Divorce Act, for example, authorizes trial courts to "equitably apportion" marital property. UNIF. MARRIAGE & DIVORCE ACT § 307, 9A U.L.A. 288 (1998) (Alternative A) [hereinafter UMDA]. Typically, courts are directed to consider all relevant factors in determining what equity requires. The UMDA, for example, directs the court to consider:

the duration of the marriage, and prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income.

Id. Also relevant is "the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit." *Id.* The UMDA neither defines "need" nor specifies appropriate weights for the various factors. See *id.*

Alimony decisionmaking is even more discretionary. Courts are typically authorized to award alimony to a needy spouse in an amount and for a duration the court deems "equitable" after considering relevant factors. The UMDA, for example, authorizes (but does not require) a court to award alimony to a spouse who: "(1) lacks sufficient property to provide for his reasonable needs; and (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home." *Id.* § 308(a). Once a claimant establishes need, a court may order alimony "in amounts and for periods of time the court deems just," after considering:

- (1) the financial resources of the party seeking maintenance, including marital property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
- (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
- (3) the standard of living established during the marriage;
- (4) the duration of the marriage;

While debunking mother myths and abandoning the false egalitarian model they support is an important beginning, it is not enough. A new model of marriage must replace the old. A better model must reflect the reality of gender roles without entrenching those roles, embrace spousal equality rather than patriarchy, and understand the difference between equality in status and identity of contribution. Such a model comes from an analogy to the rules and principles of partnership. Partnership offers a gender-neutral vocabulary and an equality-based model for marriage. It also offers the essential lesson that spouses can be equally invested in the risks, losses, and gains of marriage even though their contributions to marriage differ in kind and quantity.

The urgency of this reexamination of marital norms is underscored by publication of the American Law Institute's *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION*.¹² In these *PRINCIPLES*, the ALI offers a helpful framework for state laws that create entitlements to post-divorce income sharing.¹³ The danger, of course, is that state rulemakers will be as seduced by mother myths as their predecessors. At worst, new statutes will memorialize these myths, creating modernized, bright-line divorce regimes that punish mothers with even greater certainty than the discretionary regimes of current law. This risk, together with the inequitable treatment of divorcing mothers under current law,¹⁴ prompts this examination of the unacknowledged role of mother myths in divorce.

Parts I through III of this article each describe a mother myth, subject that myth to a reality check, explain its impact on the law of divorce, and gauge the ALI's response as a sometimes eager, sometimes reluctant, myth slayer. Part IV briefly presents a myth-free alternative marriage model drawn from an analogy to partnership.

(5) the age and the physical and emotional condition of the spouse seeking maintenance; and

(6) the ability of the [payor] spouse . . . to meet his needs while meeting those of the spouse seeking maintenance.

Id. § 308(b). The very broad judicial discretion inherent in such schemes invites courts to rely on internal moral codes and on the myths addressed in this article.

12. ALI, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* (2000) [hereinafter *PRINCIPLES*].

13. The ALI leaves the details of these laws to individual rulemakers. As the commentary to the *PRINCIPLES* explains, "[i]n many cases, implementation of a Principle requires policy choices at a more detailed level than the Principle itself resolves. In such cases the Principle typically requires the adoption of statewide rules that address the matter on a more detailed level." *Id.* § 1.01 cmt. a. The appropriate rulemaker may be a legislature, court or administrative agency, depending on the rules of the individual state. *Id.* § 1.01 cmt. c.

14. See generally OKIN, *supra* note 3, at 160-67.

It is my hope that this attempt to debunk mother myths will contribute to the ultimate adoption of a partnership model of marriage that casts married mothers, not as impossible characters of fable, but rather as equal partners in the fundamentally valuable but exceedingly risky work of raising children.

I. MOTHERING JUST HAPPENS

*The coolest mom I know who's not mine is Connor's.
She plays soccer with him all the time. I don't think
she has a job. She cooks.*¹⁵

A. Invisible Mothers

When I was a child, evidence of my mother's labor was everywhere: underwear in drawers, milk in the refrigerator, dinner on the table, and sometimes when I came home from school oatmeal crisps made with real butter. Yet it never occurred to me that any of these things required much effort or time. These were simply my entitlements, dependably appearing, of mysterious and unimportant origin. Underwear in drawers just happened.

Like other Higher Beings,¹⁶ mothers are invisible in the ordinary course of life.¹⁷ In the private sphere where mothers work, no one watches. Daily details of mothering are largely unnoticed, drawing attention (and alarm) only when their absence becomes neglect. In a strange irony, neglectful mothers are visible; conscientious ones are not.¹⁸ As Ann Crittenden observes, the "more skillful the caregiver, the more invisible her efforts become. Ideally, the recipients themselves don't even notice that they are being cared for"¹⁹

15. Amy Finnerty, *A Stay-At-Home Mom*, N.Y. TIMES, Nov. 15, 1998, at 81 (quoting a six-year-old interviewee). A middle-class eight-year-old may view a stay-at-home mom as the "ultimate trophy." *Id.* An at-home mom confirms her children's perspective that "they are, in fact, the center of the universe." *Id.* Not surprisingly, children ranked Mom's job as 14 on a 15-point scale of importance (quoting a Westinghouse study). *Id.*

16. Mothers are sometimes thought to be transcendental. As Thackeray observed, "Mother is the name for God in the lips and hearts of little children." WILLIAM MAKEPEACE THACKERAY, VANITY FAIR 478 (Oxford Univ. Press 1983) (1847).

17. ANN CRITTENDEN, THE PRICE OF MOTHERHOOD 72 (Metropolitan Books 2001).

18. *Id.*

19. See *id.*; see also Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 776 (1993) (noting that "even within the family . . . caregiving is largely invisible").

Mothers themselves reinforce the myth that mothering just happens. Consider the case of Harriet Beecher Stowe, who confessed to being "constantly pursued and haunted by the idea that I don't do anything." CRITTENDEN, *supra* note 17, at 53 (citing JEANNE BOYDSTON, HOME AND WORK: HOUSEWORK, WAGES, AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC 162-63 (1990)). And yet in the previous year (1849), Stowe "made two

If mothers received payment for their work, their efforts might be more visible. Babysitters, nurses, housekeepers, launderers, cooks, seamstresses, and painters all earn paychecks in the marketplace, yet when they perform similar labors in their homes they are considered unemployed.²⁰ The invisibility of mothering thus seems to stem not from the nature of the work itself, but rather from the fact that mothers are doing it.²¹ The disproportionate attention paid to fathers who perform caretaking tasks underscores the fact that gender plays a critical role in visibility.²²

At its most extreme the myth that mothering just happens accounts for the popular, if peculiar, myth that full-time mothers are extinct, or almost extinct — swiftly disappearing relics of the Betty Crocker era.²³ According to myth, in today's egalitarian, gender-neutral culture mothers and fathers co-parent, both working full-time in the paid economy and sharing equally in their leisure time the few family tasks that are really necessary.²⁴ Accordingly, museum commentary references the "disappearance of full-time homemakers,"²⁵ and the popular press trumpets the demise of the traditional family.²⁶

sofas, a chair, diverse bedspreads, pillowcases, pillows, bolsters, and mattresses; painted rooms; revarnished furniture; [gave] birth to her eighth child; [and ran] a huge household" CRITTENDEN, *supra* note 17, at 53.

20. Katharine Silbaugh has urged more serious consideration of the economics of home labor. See Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81, 83 (1997).

21. See *id.* at 82 (discussing whether housework is "viewed as a commodity is contextual, not activity-based").

22. As Justice Bird observed, a decision maker may glorify a father because he "often prepared the child's breakfast and dinner and picked her up from the day care center himself [though it] is difficult to imagine a mother's performance of these chores even attracting notice, much less commendable comment." *Burchard v. Garay*, 724 P.2d 486, 495-96 n.6 (Cal. 1986) (Bird, C.J., concurring). Justice Bird further noted that, this double standard is curiously two-edged when it comes to mothers. Even as a mother's presence in the home is invisible, her absence as she participates in the paid economy is conspicuous and may be viewed as evidence that she has abandoned her motherly duties. Fathers, however, are not only very visible in their caretaking efforts but are expected to invest in the paid economy and are certainly not suspected of having abandoned their families when they do so. *Id.* at 496; see also FINAL REPORT OF THE MICHIGAN SUPREME COURT TASK FORCE ON GENDER ISSUES IN THE COURTS, 69 (1989) (reporting "[s]tereotypes that influence some judges and that disadvantage mothers include" the view that "[f]athers who exhibit any interest in parenting should be granted custody despite years of primary caretaking by mothers").

23. Cynthia Starnes, *Reflections on Betty Crocker, Soccer Mom and Divorce: A Message from Detergent Manufacturers*, 1997 WIS. L. REV. 285, 287 (1997).

24. *Id.* at 288-89.

25. A particularly poignant example of this rhetoric appeared in New York's Cooper-Hewitt Exhibit on Mechanical Brides. Next to a 1961 photo on display, museum commentary noted the "disappearance of full-time homemakers." *Id.* at 287. For a discussion of this rhetoric see generally *id.*

26. A New York Times article, for example, touted the fact that the two-working-parent family has become a fifty-one percent majority of all two-parent families. Tamar

Yet, empirical studies reveal that large numbers of married mothers are working full-time in their homes, especially when their children are young.²⁷ In 2004, 50.7 percent of married women with children under age one did not participate in the paid labor force, an increase of 2.9 percent since 1997.²⁸ In fact, although not widely publicized, the labor force participation of married women with children under age one has declined every year since 1998.²⁹ Also in 2004, 43.1 percent of married women with children under age six did not participate in the paid labor force, an increase over 2003 figures,³⁰ and 26.9 percent of married women with children between ages six and seventeen did not participate in the paid labor force.³¹ The point is not that full-time mothering is good or bad, wise or unwise, but only that it is really happening.

Even when a married mother works outside her home she likely serves as the primary family caretaker, undertaking a disproportionately large share of household chores. In 2004, adult women in households with children under age six spent 2.7 hours daily in primary childcare, as compared with 1.2 hours for men in similar households.³² In households with children under age eighteen, the

Lewin, *Now a Majority: Families With 2 Parents Who Work*, N.Y. TIMES, Oct. 24, 2000, at A20. What is surprising is actually the flip side of this figure: in forty-nine percent of two-parent families, one or both parents do *not* work outside the home. This latter figure is actually the more newsworthy because it suggests that our view of two working parents as the normative family structure has but a tenuous claim to reality.

27. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT CHARACTERISTICS OF FAMILIES IN 2004, tbl. 6 (2005) [hereinafter BLS-2005].

28. *Id.*

29. *Id.*

30. *Id.* at tbl. 4. In 1999, only about forty percent of married women with children under age six worked full-time in the market, twenty percent worked part-time, and almost forty percent were not employed in the market at all. CRITTENDEN, *supra* note 17, at 277 n.8 (citing Steve Hipple, Bureau of Labor Statistics). In 1993, the Bureau of Labor Statistics reported that, while ninety-six percent of fathers worked outside the home, only sixty-five percent of mothers did so. See *Family and Medical Leave Act Poster and Background Paper*, DAILY LAB. REP. (BNA), No. 141, July 26, 1993, at D-25 (cited in 44 DRAKE L. REV. 51, 52 n. 4). In 1991, the Bureau of Labor Statistics counted sixteen million married women who were not in the labor force because they were "keeping house" (as compared with 415,000 men). BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 39 EMPLOYMENT AND EARNINGS, No. 1 at 204, tbl. 35 (1992).

31. BLS-2005, *supra* note 27, at tbl. 4. In 1999, twenty-nine percent of married women between ages twenty-five and fifty-four with children under age eighteen worked exclusively in their homes. CRITTENDEN, *supra* note 17, at 17 (citing an unpublished March 1999 Current Population Survey). Approximately twenty percent of these mothers were officially classified as "working," although their work was part-time, a category that includes those "employed for as little as one hour a week," those "merely looking for paid work," and those who work without compensation for at least five hours a week in a family business. CRITTENDEN, *supra* note 17, at 18.

32. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, AMERICAN TIME-USE SURVEY, TECHNICAL NOTES tbl. 9 (2004). The Bureau's definition of "primary childcare" includes

comparable figures were 1.8 hours per day (for women) and 0.8 hours per day (for men).³³ When one expands the definition of mothering to include activities in the home less directly related to children, the disparity between the family workloads of men and women is startling. David Demo and Alan Acock, for example, report that women continue to assume seventy to eighty percent of all housework.³⁴

Yet, despite overwhelming evidence to the contrary, the myth continues that Betty Crocker³⁵ and Soccer Mom³⁶ have disappeared. Perhaps, however, this gap between rhetoric and reality is just a temporary problem that will disappear as older mothers are replaced by younger ones with more egalitarian views. Surely in this equal-opportunity, co-parenting, post-*Mystique* era,³⁷ younger women will

“physical care; playing with children; reading to children; assistance with homework; attending children’s events; taking care of children’s health care needs; and dropping off, picking up, and waiting for children.” *Id.* at tbl. 9. This definition of childcare thus excludes time spent in activities that benefit children, but that are less directly related to childcare, such as preparing meals, shopping, cleaning house, and stocking underwear drawers.

33. *Id.* at tbl. 9; see also Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177, n.21 (2000) (citing several studies reporting that women spend more hours in home care than men, including one report that “mothers of pre-school age children spent 100 hours more per month than men in childcare”).

34. David H. Demo & Alan C. Acock, *Family Diversity and the Division of Domestic Labor: How Much Have Things Really Changed?*, 42 FAM. REL. 323, 326 (1993); see also FRANCES K. GOLDSCHIEDER & LINDA J. WAITE, *NEW FAMILIES, NO FAMILIES?: THE TRANSFORMATION OF THE AMERICAN HOME* 111 (1991) (reporting that in households where both spouses work outside the home, “employed wives seem simply to add the demands of a job to their traditional responsibilities of running a household”); ARLIE HOCHSCHILD, *THE SECOND SHIFT* 8 (1989) (citing a study in which husbands performed half of household work in only twenty percent of dual-earner families; none of the husbands studied did more); Silbaugh, *supra* note 9, at 10 (observing that women spend more than half their working hours on housework while men spend less than one-fourth of their working hours on housework); see also Ira Mark Ellman, *Divorce Rates, Marriage Rates and the Problematic Persistence of Traditional Marital Roles*, 34 FAM. L.Q. 1 (2000); Steven Nock, *Time and Gender in Marriage*, 86 VA. L. REV. 1971 (2000).

35. “Betty Crocker” is used here to refer to a full-time homemaker. See *infra* note 37.

36. “Soccer Mom” is used here to refer to a primary homemaker who also works in the paid economy, either part-time or full-time. The term “soccer mom” was coined by Susan Casey in her 1995 campaign for Denver City Council. See Christopher Cox, *Original Soccer Mom Spurs Kick*, BOSTON HERALD, Oct. 24, 1996, at 1. In Casey’s words:

We arrange our lives around our kids and support them . . . I wanted people to understand that. I’ve been a teacher, I have a Ph.D., I’ve managed national presidential campaigns, but when I wake up in the morning and when I go to bed at night, my heart and soul are in my family.

Id.

37. Over forty years have passed since *The Feminine Mystique* challenged the norm of homemaking as feminine destiny. See generally BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1962). When *The Feminine Mystique* was published in 1962, it sparked a revolution against Betty Crocker, the full-time homemaker, who according to 1950s rhetoric, represented women’s sole opportunity for happiness. Such illusions about feminine destiny, argued Friedan, cause women to abandon their dreams, forfeit their selves and generally fall victim to the “housewife’s trap.” *Id.* at 338. The revolution

not make the same decisions about mothering as their mothers. Or will they? According to some reports, younger mothers are increasingly choosing full-time homemaking,³⁸ and in this post-September-11 era, with its renewed longing for the comforts of hearth and home,³⁹ Betty Crocker and Soccer Mom may well become an even more daily reality. Such a possibility would help explain the peculiar popularity of pastel and fire-engine red KitchenAid Mixers, new millennial renditions of a homemaking favorite from an era supposedly long gone.⁴⁰

B. The Law of The Invisible Mother

The law of divorce too often assumes mothering just happens. Under this view:

care of the house and children can be done with one hand tied behind the back. Send the kids out to school, put them to bed, and the rest of the time free to play tennis and bridge.⁴¹

As one court observed, in justifying short-term alimony to a full-time mother of three minor children: “I don’t think she would want to sit around the rest of her life. My God, she will turn into a vegetable if she did that anyhow.”⁴² Evidently, mothering requires little effort or time — not enough to interfere with a mother’s ability and responsibility to pursue a *real* job. So myth has it.

against domesticity, however, has not eliminated at-home mothers. *See supra* notes 27-31 and accompanying text.

38. *A Change of Place*, BARRON’S, Mar. 21, 1994, at 34 (citing Bureau of Labor statistics showing that “[a]fter three decades of growth, labor force participation by women appears to be slowing, with Generation X driving the trend”); *see also* Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, Oct. 26, 2003, § 6 (Magazine), at 44 (reporting that middle-class women are increasingly choosing full-time homemaking); Peggy O’Crowley, *More Women are Choosing to Make a Career Out of Raising Their Children*, NEWHOUSE NEWS SERVICE, Apr. 19, 2002, at B1, <http://www.newhousenews.com/archive/story1b041902.html> (reporting that “[f]or the first time in 25 years, the seemingly unstoppable advance of mothers going back to work after having a baby has reversed”).

39. *See, e.g.*, David Handelman, *In Pensive Times, Comfort Magazines Find an Audience*, N.Y. TIMES, Oct. 29, 2001, at C11 (noting the post-September-11 success of magazines with “a reassuring touch . . . in some way underpinning a sense of home and comfort”); *see also* Patricia Leigh Brown, *Losing Her Heart to a Wooded House in the Prairie Style*, N.Y. TIMES, Feb. 15, 2002, at G1 (“To feel at home. It’s an emotional connection, an intangible tug of the heart.”).

40. For a picture of a lavender KitchenAid mixer and an observation on its appeal, *see* William L. Hamilton, *Seeing the Future in All Its Hues*, N.Y. TIMES, Jan. 10, 2002, at F1.

41. Lynn Hecht Schafran, *Documenting Gender Bias in the Courts: The Task Force Approach*, 70 JUDICATURE 280, 285 (1987) (describing the view of some New York legislators).

42. *Hartung v. Hartung*, 102 Wis. 2d 58, 67, 306 N.W.2d 16, 19 (Wis. 1981). For a discussion of this case, *see* Estin, *supra* note 19, at 732.

As long as their marriages remain intact, many married mothers are protected from the impact of the law's distorted perceptions of mothering. For those whose marriages end, however, the consequences of the myth that mothering just happens can be devastating. Faced with a judge vested with broad discretion to achieve economic equity,⁴³ mothers who have forgone or significantly limited market participation to assume primary home responsibilities will face an inevitable question: "*What have you been doing with all your time?*" The question, of course, is rhetorical, and the answer inescapable: "*I've been doing nothing, really — sitting on the sofa eating bonbons (while the cooking, the cleaning, the shopping, the laundering, the tutoring, the grooming, the chauffeuring, the listening, the disciplining and the stocking of underwear drawers just happened).*" The judicial response is predictable and unequivocal: "*Then shame on you. You have brought your economic troubles on yourself.*"⁴⁴

The law of the invisible mother supports the complementary notion that monetizing home work is an inapt, futile endeavor that threatens to destroy the Higher Being⁴⁵ status of mothers.⁴⁶ If mothering just happens without the intervention of human hands, then attempting to place a worldly value on it would be inappropriate, indeed foolish. The implication of such reasoning is clear enough: a

43. See *supra* note 11.

44. For a discussion of the Excessive Mother (as opposed to the slothful mother) who has allegedly spent too much time mothering her children, see *infra* Part III.

45. See THACKERAY, *supra* note 16.

46. According to commodification critics, because market concepts cannot fully capture the value in intimate relationships, they threaten to destroy that value. As Margaret Jane Radin explains, "many kinds of particulars — one's politics, work, religion, family, love, sexuality, friendships, altruism, experiences, wisdom, moral commitments, character, and personal attributes [are] . . . integral to the self. To understand any of these as monetizable . . . is to do violence to our deepest understanding of what it is to be human." Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1905-06 (1987). Simply put, commodification skeptics believe "talk matters: you can pervert the personalness of something by talking about it as if it were fungible." Silbaugh, *supra* note 20, at 85-86.

Katharine Silbaugh powerfully critiques this notion, arguing that it is actually the refusal to monetize mothers' domestic chores, rather than such monetization, that threatens to diminish mothering. *Id.* As Silbaugh explains, an activity may have "plural meanings: multiple understandings of a single activity that can co-exist." *Id.* at 96-100. Commodification anxiety, concludes Silbaugh, "protects" women by leaving them "without cash in the name of non-commodification." *Id.* at 95. Vicki Schultz, however, worries that while "[n]o self-respecting feminist could be against 'valuing housework,'" this process might "encourage women to concentrate on housework and child care at the expense of a deep commitment to paid work." Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1900-11 (2000).

For a reference on the commodification debate, see generally RETHINKING COMMERCIALIZATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman & Joan C. Williams eds., 2005).

divorcing mother who has contributed no real value to marriage has earned no right to share in any economic fruits of marriage.⁴⁷

C. *The ALI Response*

Hope for a more realistic view of the reality of mothering comes from the American Law Institute (ALI). In its *PRINCIPLES*, the ALI bravely confronts the myth that mothering just happens:

[D]espite the dramatic changes in the workforce participation of married women over the last several decades, marital roles have persisted and their impact on the work experiences of married women remains great. Whether or not women actually leave full-time employment after the birth of their children, studies consistently show that *they usually perform far more than half of the married couple's domestic chores*.⁴⁸

As the ALI sees it, mothers are at work in both the market and the home, caring for children and washing underwear, undertaking responsibilities disproportionate⁴⁹ to those of their spouses.

Accordingly, the ALI offers a new alimony model designed especially for primary caretakers.⁵⁰ Under this model, a presumption arises that a spouse's disparately low earning capacity (in relation to the other spouse) is the result of service as the family's primary caretaker.⁵¹ A mother is thus presumptively entitled to alimony if her earning capacity is substantially less than that of her husband. This scheme turns the myth that mothering just happens on its head,

47. Many states list the contribution of a homemaker to the acquisition of assets as a factor for the court to consider as it attempts to equitably distribute marital property and determine the appropriate amount and duration of any alimony award. *See* IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 287-88 (4th ed. 2004).

48. *PRINCIPLES*, *supra* note 12, § 5.05 reporter's notes cmt. d. (emphasis added, citations omitted).

49. *Id.* § 5.05 reporter's notes cmt. c.

50. *Id.* §5.05 (1) and (2).

51. *Id.* §5.05 (2) provides:

Entitlement to an award under this section should be determined by a rule of statewide application under which a presumption of entitlement arises at the dissolution of a marriage in which

(a) there are or have been marital children, or children of either spouse;
(b) while under the age of majority the children have lived with the claimant (or with both spouses, when the claim is against the stepparent of the children), for a minimum period specified in the rule; and
(c) the claimant's earning capacity at dissolution is substantially less than that of the other spouse.

Id. The *PRINCIPLES'* alimony model is again discussed at *infra* notes 98-107 and accompanying text. For a discussion of the market costs of mothering, see *infra* Part II.A.

presuming that mothering *does* happen and leaving it to a higher-income spouse to prove otherwise.⁵² While the ALI's reconceptualized alimony scheme raises other more problematic issues,⁵³ its frank recognition of the reality of family caretaking is encouraging.

Although the ALI seems eager to recognize the reality of quasi-traditional marriages, it is oddly reluctant to recognize the continuing reality of traditional marriages.⁵⁴ The ALI, for example, contrasts "the historical pattern in which wives were financially dependent upon their husbands"⁵⁵ with "the more usual modern arrangement in which both spouses are employed outside the home."⁵⁶ While the ALI acknowledges that family responsibilities often precipitate gaps in women's employment,⁵⁷ such gaps are cast as aberrations from more ordinary work patterns. Some of the ALI's language seems to discount the reality of full-time mothers altogether. "In the late 20th century . . . universal adult labor force participation is both the empirical norm and the norm generally assumed"⁵⁸

What about the 50.7 percent of married women with children *under age one* who did not work outside their homes in 2004, the 43 percent with children *under age six* who did not work outside their homes, and the 26.9 percent with children between *ages six and seventeen* who did not work outside their homes?⁵⁹ These at-home mothers will no doubt be surprised to discover that they lie outside the generally assumed norm.

Notwithstanding its disappointing treatment of traditional marriages, the ALI's partial success in slaying the myth that mothering just happens is a step forward. Until fully slain, however, the myth

52. PRINCIPLES §5.05 (3) provides:

A presumption of entitlement governs in the absence of a determination by the trial court that the claimant did not provide substantially more than half of the total care that both spouses together provided for the children.

53. *Id.* Unfortunately, the ALI's choice of a loss-based model rather than a contribution model for alimony unnecessarily casts mothers as victims rather than partners and sends a dispiriting message about the status of married mothers. For a critique of the ALI's theoretical model for alimony, see Cynthia Lee Starnes, *Mothers as Suckers: Pity, Partnership, and Divorce Discourse*, 90 IOWA L. REV. 1513, 1527-34 (2005) [hereinafter *Mothers as Suckers*].

54. PRINCIPLES, *supra* note 12, § 5.04 cmt. c.

55. *Id.*

56. *Id.*

57. The term "gappers" refers to women who have taken at least one break from work of six months or longer after attaining their last educational degree. Joyce Jacobsen & Laurence Levin, *The Effects of Intermittent Labor Force Attachment on Female Earnings*, 18 MONTHLY LAB. REV., 14, 15 (Sept. 1995). Gappers include women who drop out of the market for reasons other than family responsibilities, including layoffs, ill health, or migration. *Id.* at 16.

58. PRINCIPLES, *supra* note 12, § 3.03 cmt. d.

59. BLS-2005, *supra* note 27, at tbl. 4.

will continue to cast mothers, especially at-home mothers, as lazy, inferior characters who may generate pity, but who deserve neither respect nor economic entitlements at divorce. The myth that mothering just happens will also deter legal actors from inquiring into the market consequences of mothering, thus contributing to the complementary myth that mothering is free.

II. MOTHERING IS FREE

*[A]ny woman — no matter her age or lack of training — can find a nice little job and a nice little apartment and conduct her later years as she might have done at age 25.*⁶⁰

A. The Cost-Free Mother

If mothering just happens, it must also be free. As a child, I never considered that mothering imposed costs. By doing the laundry, the shopping, the cooking, and the cleaning, my mother invested time and energy that limited her opportunity to do other things. I am sure I never once considered the possibility that in the time my mother spent monitoring and laundering my underwear she could have been reading a book or investing creative energy at the office. If mothering was costly my mother never told me. I thought mothering was free.

According to myth, mothering imposes no market costs on women. It is, rather, a spare-time activity that barely detracts from a woman's participation in the paid economy. Mothering thus precipitates no loss in human capital and leaves mothers and fathers in the same economic position at divorce. Indeed, to view mothers as economically disadvantaged by mothering is insulting to women. So myth has it.

The truth, however, is that mothering is not free. It exacts a significant price from mothers in the form of lost market opportunities. Simply put, time spent laboring in the home is time not spent laboring in the market, and as mothers limit their investment in a job or career, their ability to generate income decreases. Ultimately, mothers lose some opportunities altogether. The realities of depreciating human capital impact many types of mothers: full time housewives, who forgo market employment altogether; gappers, who periodically drop out of the job market; and the many primary homemakers, who continually compromise their market engagement to assume a major portion of family responsibilities.

60. Schafran, *supra* note 41, at 285 (quoting a New York legislator's description of distorted judicial perspectives).

Empirical studies confirm that mothers do indeed pay a market price for their work in the home.⁶¹ Recent data suggest that the long-reported wage gap between income-earning men and women is more closely linked to mothering than to gender alone.⁶² Indeed, when one compares the incomes of childless men and women, the wage gap narrows considerably. Diana Furchtgott-Roth and Christine Stolba found that in 1993, childless women (age twenty-seven to thirty-three) earned ninety-eight percent as much as childless men in the same age group.⁶³ This finding is consistent with the much-cited work of Victor Fuchs, who reported that the hourly wages of women, but not men, decline proportionately with the number of children in the household.⁶⁴

The costs of mothering are most evident in the case of displaced homemakers, long-term Betty Crockers who have spent their most career-productive years in the home rather than the market.⁶⁵ Evidence of the financial vulnerability of these women is unmistakable, largely because their opportunity costs have been actualized and thus are easily demonstrable.⁶⁶ If their marriages end, these women cannot simply return to the marketplace armed with a résumé listing “mom” as previous work experience and easily compete with workers twenty years younger. Time lost in the home cannot often be reclaimed when the home is lost. For the full-time homemaker of many years, divorce ruthlessly shatters any pretense that mothers can recapture years spent washing underwear.

Even temporary withdrawals from paid employment to care for children can impact earning capacity, perhaps indefinitely. Joyce Jacobsen and Laurence Levin report that “women whose labor force gap occurred more than 20 years ago still earn between 5 percent and 7 percent less than women who never left the labor force and have comparable levels of experience.”⁶⁷

61. See generally CRITTENDEN, *supra* note 17.

62. See generally *Mothers as Suckers*, *supra* note 53.

63. DIANA FURCHTGOTT-ROTH & CHRISTINE STOLBA, WOMEN'S FIGURES: THE ECONOMIC PROGRESS OF WOMEN IN AMERICA 8 (1996). According to Columbia professor Jane Waldfogel, “the family gap between women with children and women without children has been rising in recent years, even as the gender gap between women and men has been narrowing.” Jane Waldfogel, *Understanding the “Family Gap” in Pay for Women with Children*, 12 J. ECON. PERSP. 137, 143 (1998).

64. VICTOR FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 61-62 (1988). For women, concludes Fuchs, “the greatest barrier to economic equality is children.” *Id.* at 147; see also Waldfogel, *supra* note 63, at 153 (stating that Fuch's observation “is at least as true today as it was a decade ago”).

65. See generally Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67 (1993) [hereinafter *Displaced Homemaker*].

66. See generally *id.*

67. Jacobsen & Levin, *supra* note 57, at 18. The researchers' hypothetical case of a

Easiest to ignore are the market costs incurred by primary homemakers, typically mothers, who combine market employment with a second shift as primary family caretaker.⁶⁸ These mothers often work part-time or part-year, but even those who work full-time, year-round, are likely to limit their market investment to perform primary caretaking responsibilities.⁶⁹ As Congress recognized in the Family and Medical Leave Act, a caretaker's home responsibilities often limit her career choice and advancement.⁷⁰ Indeed, many women "choose work that will fit around . . . their family responsibilities, a complication and impediment to occupational advancement not faced by most men."⁷¹ As Jerry Jacobs and Kathleen Gerson observe, a primary incident of motherhood is reduced working time.⁷² From an employer's perspective, a primary homemaker is simply not an "ideal worker."⁷³

Whether she is a full-time homemaker, a gapper, or a primary homemaker, a mother's efforts in the home are likely to reduce her earnings in the paid economy. Unfortunately, the law seems loath to acknowledge this reality.

B. The Law of the Cost-Free Mother

No-fault divorce laws invite judges to entertain the myth that mothering is free. This invitation is fundamentally grounded in the underlying philosophy of no-fault divorce. The basic scheme of no-fault is to allow easy access to divorce without a showing of fault⁷⁴ and sometimes at the will of only one spouse.⁷⁵ The law has abandoned

woman who dropped out of the paid labor force from age twenty-five to age thirty-two illustrates the impact of these figures. *Id.* This woman's seven-year gap in employment cost her ten years of earnings. *Id.*

68. See generally HOCHSCHILD, *supra* note 34.

69. See Demo and Acock, *supra* note 34, at 325-26.

70. See Family and Medical Leave Act, 29 U.S.C. § 2601(a)(5) (1996).

71. BUREAU OF THE CENSUS, U.S. DEPT OF COM., WOMEN IN THE AMERICAN ECONOMY, SERIES P-23, NO. 146, at 7 (1986).

72. JERRY A. JACOBS & KATHLEEN GERSON, THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY 111 (2004). These researchers note, for example, that working women are more likely than working men to stay home when child-care arrangements fail or when a child is sick. *Id.* at 90. Ann Crittenden cites a 1996 study in which married mothers who worked outside their homes averaged 1,197 hours in paid employment, as compared with 2,132 hours for married fathers. CRITTENDEN, *supra* note 17, at 18 (citing Deborah Fallows in a 1996 panel discussion at the Harvard/Radcliffe twenty-fifth reunion).

73. See JOAN WILLIAMS, UNBENDING GENDER 1 (2000) (describing a gender-based system of "domesticity," consisting of an ideal worker "who works full time and overtime and takes little or no time off for childbearing or child rearing" and a marginalized caregiver who supports his ideal worker status).

74. The specific grounds for a fault-based divorce vary by state. Typical grounds are adultery, desertion, and cruelty. See ELLMAN ET AL., *supra* note 47, at 207.

75. Although rarely acknowledged in no-fault statutes, most no-fault divorce laws

old notions of divorce as a remedy for a wronged spouse in favor of the more pragmatic, less moralistic notion that divorce is merely legal recognition that a marriage has died, if not of its own volition, then at least without any identified fault by either party.⁷⁶ Free of blame, each spouse is thus entitled to begin life anew, free of the shackles of a dead relationship. To the extent these shackles include economic entanglements, then those too must be severed. Just as neither spouse is responsible for failure of the marriage, neither is responsible for the other's financial situation. Each spouse deserves a fresh start, a clean break that severs both the parties' legal status and their financial rights and responsibilities. So the no-fault storyline reads.

In practical terms, this clean-break principle encourages judges in our hugely discretionary regime⁷⁷ to settle all equities between the spouses through a one-time division of property and to deny or severely limit alimony.⁷⁸ If alimony is unavoidable,⁷⁹ it should be limited to the smallest amount necessary for a spouse's retraining, i.e., for rehabilitation to enable the damaged spouse to begin a new life as a productive citizen this time around.⁸⁰ More extensive alimony would

effectively authorize divorce at the will of one spouse. *See id.* at 222 (noting that "while the law in the books does not recognize unilateral divorce, in most states the law in action does").

76. No-fault statutes come in two types: "marital breakdown standards" and living "separate and apart" standards. *Id.* at 219.

77. *See supra* text accompanying note 11. For a discussion of the discretionary nature of property division and alimony, see *Displaced Homemaker*, *supra* note 65, at 92-95, 101-06.

78. As the Official Comment to the UMDA § 308 explains:

The dual intention of this section and Section 307 [on property division] is to encourage the court to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance. Only if the available property is insufficient for the purpose and if the spouse who seeks maintenance is unable to secure employment appropriate to his skills and interests or is occupied with child care may an award of maintenance be ordered.

UMDA, *supra* note 11, § 308, Official Comment.

Even under fault-based divorce laws, parties usually received a clean break, as evidenced by the surprisingly small number of cases in which alimony was ordered. In 1990, the Census Bureau reported that 16.8 percent of the 19.3 million ever-divorced and currently separated women (as of 1987) were entitled to receive alimony under a divorce decree. BUREAU OF THE CENSUS, U.S. DEPT OF COM., CURRENT POPULATION REPORTS — CHILD SUPPORT AND ALIMONY: 1987, SERIES P-23, NO. 167 at 11 (1990). Curious then is the comment in the UMDA Prefatory Note that "the Act does not continue the traditional reliance upon maintenance as the primary means of support for divorced spouses." UMDA, *supra* note 11, at Prefatory Note.

79. The level of need required to qualify a claimant for alimony is unclear. "Need" has no precise definition and could conceivably be tested against a variety of comparative baselines, including the federal poverty level or, more generously, against the standard of living during marriage. *See ELLMAN ET AL.*, *supra* note 47, at 380-82.

80. *See, e.g.*, UMDA, *supra* note 11, § 308(b). The word "rehabilitation" suggests a

inappropriately and unnecessarily prolong the economic agony of a dead marriage and send a negative message about women's dependency on men.⁸¹ If the critical alimony question is thus "how much time will it take to repair an economically needy mother?" Myth supplies an easy answer: "very little, since mothering is free."

The clean-break principle and its supporting mother myth pose significant danger for real mothers. Most obviously, judges are tempted to overlook disparate economic positioning resulting from marital roles and to ignore the reality that a mother who has worked exclusively or primarily in her home during marriage is not likely to be the market equal of her husband who has more fully invested in paid employment.⁸² If disparate positioning really exists it spoils everything. If the parties do not own much property, a common fact pattern,⁸³ then a court can not achieve equity by awarding the lower income spouse a larger share of marital property. In such cases, clean-break principles conflict with principles of equity. Pretending that homemaking has not imposed market costs avoids this conflict. It is easier to deny the costs of mothering than to reconcile income disparities with clean-break principles. It is easier to insist that if income disparity exists, it is the product of a mother's poor work

blame-the-victim perspective, as if mothers are criminals in need of rescue from their lives of vice. For a discussion of the expectation of rehabilitation as a limitation on the duration of alimony, see ELLMAN ET AL., *supra* note 47, at 400-01.

81. Some participants in the women's movement of the 1960s and 1970s took the position that women, as the equals of men, do not need the financial support of their ex-husbands. See BETTY FRIEDAN, *IT CHANGED MY LIFE* 325-26 (1976).

The women's movement had just begun when the so-called divorce reform law was passed. At that time, we were so concerned with principle — that equality of right and opportunity had to mean equality of responsibility, and therefore alimony was out — that we did not realize the trap we were falling into.

See also Susan Westerberg Prager, *Shifting Perspectives on Marital Property Law*, in *RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS* 111, 123 (Barrie Thorne & Marilyn Yalom eds., 1982) (noting that California feminists failed to see the economic effects of no-fault divorce on women); Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789, 853-85 (observing that Wisconsin reformers mistakenly believed that injustice could be avoided by treating marriage as a partnership of equals and equally dividing marital property). But see SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 20 (1991) (arguing that feminists had virtually no involvement with divorce-law reform).

82. See Jacobsen & Levin, *supra* note 57.

83. See Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 662-63 (1991) (indicating divorcing couples in New York usually had less than \$25,000 in divisible assets); Ilene E. Shapiro & Barry P. Schatz, *Has the Illinois Equitable Distribution Statute Advanced the Cause of the Homemaker?*, 1986 ILL. B.J. 492, 500 (noting that "most estates are too small to support anyone").

ethic or intellect or of society's bias. A mother's predicament is thus her fault or society's fault and therefore appropriately ignored at divorce. Certainly it is not a husband's responsibility, for we are clear on the point that mothering is free.

Indeed, the history of no-fault divorce law is a sad tale of denial of the costs of mothering. Most distressing is the case of the full-time homemaker whose marriage ends after many years of caretaking. Early no-fault courts often seemed unaware of the costs of mothering even for these women. Seduced by egalitarian visions of housewives retrained and entering the job market, too many courts abruptly freed long-term homemakers to begin new lives — with limited property, little if any support, and years of absence from the job market.⁸⁴ For these Betty Crockers, divorce occasioned a sea change, not only in status but in economics, as they lost the family wage and often the family home.⁸⁵ At worst, a long-term caregiver was treated as a "breeding cow to be nurtured during her years of fecundity, then conveniently and economically converted to cheap steaks when past her prime."⁸⁶ Concerned commentators cried foul, task forces were launched to explore the possibility of gender bias in the courts,⁸⁷ and a myriad of divorce reform proposals were promulgated to deal more fairly with displaced homemakers.⁸⁸ Task forces partly attributed divorce inequities to gender bias in the courts,⁸⁹ and surely this is a factor, but a fuller explanation lies in the myth that mothering is free.

84. See *Displaced Homemaker*, *supra* note 65, at 78-85.

85. See *id.* at 85-96.

86. *In re Marriage of Branter*, 136 Cal. Rptr. 635, 637 (Cal. Ct. App. 1977).

87. For a general description of gender bias in the courts, see ABA ISSUES HANDBOOK (Jan. 2002) ("Gender bias in the courtroom generally takes three forms: stereotyping the nature and roles of women and men; devaluing women and what is perceived as women's work; and acting on myths and misconceptions about the social and economic realities of women's and men's lives."). See generally Isabel Marcus, *Reflections on the Significance of the Sex/Gender System: Divorce Law Reform in New York*, 42 U. MIAMI L. REV. 55 (1987); Schafran, *supra* note 41.

88. See, e.g., OKIN, *supra* note 3, at 182-83; June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 359 (1994); *Displaced Homemaker*, *supra* note 65; Martha Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998); Estin, *supra* note 19; Joan M. Krauskopf, *Comments on Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 417 (1994); Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539 (1990); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1989).

89. See, e.g., MICHIGAN SUPREME COURT TASK FORCE ON GENDER ISSUES IN THE COURTS, CONCLUSIONS AND RECOMMENDATIONS 8 (1989) (finding that "resolution of economic issues is often premised on misconceptions about the economic consequences of divorce for women").

Some commentators claim the law is moving toward a more realistic and more humane treatment of displaced homemakers.⁹⁰ Hopefully they are right. However, the continuing vitality of the clean-break philosophy suggests that no-fault divorce laws have not altogether escaped their history. Indeed, even as the law may be moving toward more realistic views of the cost of mothering for long-term homemakers, it appears stubbornly resistant to evidence that primary homemakers, who combine market and family work, also experience market costs.⁹¹ A primary homemaker's market participation may be exaggerated and her home efforts minimized in order to create the illusion of a fully egalitarian marriage that facilitates conscience-free application of the clean-break principle. Yet even after divorce this younger mother's market losses will continue to accrue as she undertakes primary caretaking responsibilities,⁹² often with less help from her children's father than while their marriage was intact. While such a mother may benefit incidentally from child support, such support will not compensate her for the depreciation in human capital caused by market disinvestment.⁹³ Child support, by definition, aims to provide for children and not for the mother who cares for them.⁹⁴

The temptation to ignore the costs of mothering, especially in the case of younger mothers, is made more compelling by the law's traditional reluctance to recognize lost opportunities as compensable losses. Although contracting parties understand the reality of lost opportunities, the law traditionally has viewed them as too speculative to warrant recovery because it generally does not award damages for the lost opportunity to have contracted with a more reliable partner or to have entered into a more lucrative contract.⁹⁵ A mother's claim

90. These claims reach at least as far back as Joan Krauskopf's 1988 observation of an appellate trend "to preserve indefinite alimony by curbing the excesses of rehabilitative alimony." Joan M. Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM. L.Q. 573, 573 (1988).

91. See generally Estin, *supra* note 19.

92. See WILLIAMS, *supra* note 73, at 126. In close to ninety percent of divorces, mothers obtain primary physical custody of children. ELLMAN ET AL., *supra* note 47, at 571.

93. See *Displaced Homemaker*, *supra* note 65, at 79-80.

94. As one court explained in addressing the case of a nonmarital child: "to raise [the mother's] standard of living through the vehicle of child support would constitute the imposition of an unauthorized obligation on part of the father toward the mother." *State v. Hall*, 418 N.W.2d 187, 190 (Minn. App. 1988) (quoting Kathy G.J. Arnold D., 501 N.Y.S.2d 58, 64 (N.Y. App. Div. 1986)).

95. As Allan Farnsworth explains,

[I]t is important to understand that the law has not generally recognized yet another kind of reliance — reliance that consists in forgoing opportunities to make other contracts. In the example given, the builder may have passed up another job, and the owner may have passed up the possibility of hiring another builder in reliance on their contract. But the difficulties of proving this are obvious, and courts have not been receptive to claims

that she lost market opportunities because of mothering may trigger this traditional response, for until her childcare years end, her depreciated human capital will be partly or fully hypothetical and therefore easy to deny. Even when a mother's depreciated human capital is evident, determining the extent of that depreciation will be difficult or impossible, for rarely will there be a comparative baseline against which to measure a mother's best alternative opportunity, i.e., what she would have become but for mothering.⁹⁶ Primary homemakers may indeed be "just a man away from poverty"⁹⁷ but because they are not yet in poverty, it is easy to pretend that mothering is free.

C. The ALI Response

The ALI's success as a myth slayer lies primarily in its candid recognition of the costs of primary caretaking. These costs are "both significant and common," says the ALI, and "cannot be ignored by the law."⁹⁸ The ALI frankly acknowledges that "women's relative wage declines in nearly a straight line with the number of children in the household."⁹⁹ Moreover, "the birth of children usually affects the earning capacity of women who continue to work full time as well as those who do not."¹⁰⁰ As the ALI observes:

Economic studies demonstrate that responsibility for the care of children ordinarily has a significant continuing impact on parental earning capacity. This effect is not limited to parents who withdraw from full-time employment, but occurs also among primary caretakers who continue full-time market labor.¹⁰¹

based on this kind of reliance.

E. ALLAN FARNSWORTH, *CONTRACTS* § 12.1 (4th ed. 2004).

96. For discussion of such a lost-opportunity model, see Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 3, 40-48 (1989).

97. NATIONAL DISPLACED HOMEMAKERS NETWORK, *THE MORE THINGS CHANGE . . . A STATUS REPORT ON DISPLACED HOMEMAKERS AND SINGLE PARENTS IN THE 1980S* 60 (1990). Middle-class women are especially vulnerable to divorce laws. For low-income women divorce perpetuates, but does not initiate, poverty. For upper-class women, property is often significant, so that even half of the marital property will sustain a comfortable standard of living. For middle-income homemakers, however, property may be scant and income-earning ability compromised by primary caretaking responsibilities. As Herma Hill Kay observed, "marriage, it seems, is both a long-term cause and a short-term cure of female poverty." Herma Hill Kay, *Beyond No-fault: New Directions in Divorce Reform*, in *DIVORCE REFORM AT THE CROSSROADS* 30 (Steven D. Sugarman & Herma Hill Kay eds., 1990).

98. *PRINCIPLES*, *supra* note 12, § 5.05 cmt. d. "[W]ives continue, in the great majority of cases," adds the ALI, "to sacrifice earnings opportunities to care for their children . . ." *Id.* § 5.05 reporter's notes cmt. c. (emphasis added).

99. *Id.* § 5.05 reporter's notes cmt. d.

100. *Id.*

101. *Id.*

The ALI's answer to a mother's disparate financial positioning at divorce is to craft a new alimony scheme in which a presumption of entitlement arises if: (1) children lived with the claimant for a minimum specified period and (2) a claimant's earning capacity is "substantially less" than that of her spouse.¹⁰² Under this scheme, "the inference that child-care responsibilities adversely affected the claimant's earning capacity is not rebuttable,"¹⁰³ largely because although the link between care of children and earning capacity loss can be established generally,

it is often difficult to show in the particular case. And even where the fact of loss may be clear enough, its size often cannot be established because of the speculation inherent in comparing the actual facts with the hypothetical facts that would have developed had the parties behaved differently years earlier.¹⁰⁴

The ALI's rationale for its primary-caretaker alimony scheme lies in the proposition that a mother should not bear the entire financial cost of her role since "the cost of raising the couple's children is their joint responsibility."¹⁰⁵

Although it casts alimony as an entitlement to loss-sharing, the ALI makes alimony modifiable upon changed circumstances. Among these circumstances is a recipient's remarriage,¹⁰⁶ which the ALI sees as "the divorced woman[']s . . . surest path to financial recovery."¹⁰⁷ Something disturbing, if not familiar, lies in the suggestion that a woman's financial future depends on her ability to find a replacement male provider.¹⁰⁸ Mothers are not fungible underwear washers

102. *Id.* § 5.05(2). For the full text of this section, see *supra* note 51.

103. *PRINCIPLES*, *supra* note 12, § 5.05 cmt. d.

104. *Id.*

105. *Id.* § 5.05 cmt. a.

106. *PRINCIPLES* § 5.07 provides in pertinent part:

An obligation to make periodic payments . . . ends automatically at the remarriage of the obligee . . . without regard to the award's term as fixed in the decree, unless either (1) the original decree provides otherwise, or (2) the court makes written findings . . . establishing that termination of the award would work a substantial injustice because of facts not present in most cases

Awards under Topic 3 of the *PRINCIPLES*, which are based on reimbursement or rescission and relate to only a few marriages, do not terminate on remarriage. *Id.* § 5.14(3).

107. *Id.* § 5.07 reporter's notes cmt. c.

108. For a critique of the remarriage-termination rule generally, see Cynthia Lee Starnes, *One More Time: Intuition, Alimony, and the Remarriage-Termination Rule*, 81 *IND. L.J.* 971 (2006). The legitimacy of the near-universal rule that alimony terminates automatically or presumptively upon a recipient's remarriage has a huge impact on alimony recipients since approximately seventy-five percent of divorcing women remarry within ten years, and fifty-four percent remarry within five years. *DEPT OF HEALTH AND HUMAN SERVS., COHABITATION, MARRIAGE, DIVORCE, AND REMARRIAGE IN THE U.S., VITAL*

in need of male support — any male will do. While the ALI thus strikes a powerful blow to the myth that mothering is free and offers a compelling solution to the real cost of mothering, its willingness to abandon mothers to a Cinderella future is disappointing. Even more disappointing is the ALI's reluctance to seriously challenge the myth that mothering is for babies.

III. MOTHERING IS FOR BABIES¹⁰⁹

Now that I have them, they shan't escape me.
— Wicked Witch in Hansel and Gretel¹¹⁰

A. The Excessive Mother

Fundamentally we know The Excessive Mother exists. Take, as her extreme example, the wicked witch in Hansel and Gretel,¹¹¹ who was an Excessive Cookie Baker indeed, having constructed an entire house of gingerbread, evidently for the very bad purpose of enticing and consuming children. Such Excessive Mothers are terrible, surely enough, but wicked witches are generally easy to spot.¹¹² When, in the case of more ordinary mother figures, is enough really enough? When should a mother back off?

AND HEALTH STATISTICS, Ser. 23, Num. 22, 22 (July 2002). Moreover, subsequent marriages do not fully protect mothers from the effects of their depreciated human capital, since second marriages are at least as likely to fail as first ones. See BUREAU OF THE CENSUS, U.S. DEPT OF COM., CURRENT POPULATION REPORTS, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 1996 3 (2002) (reporting that, based on 1996 data, women who entered second marriages in 1975 through 1984 were less likely to reach their tenth anniversary than were women entering first marriages during the same period).

109. While abrogation of the tender years doctrine (*see generally Ex parte Devine*, 398 So. 2d 686 (A. 1981)) dispels the notion that babies are for moms, the law has not yet abandoned the converse notion that moms are for babies.

110. Wicked Witch, upon the approach of Hansel and Gretel. GRIMM'S FAIRY TALES BY THE BROTHERS GRIMM 330, 337 (E.V. Lucas, Lucy Crane & Marian Edwardes trans., 1945). As the story goes:

Although the old woman appeared to be so friendly, she was really a wicked old witch who was on the watch for children, and she had built the bread house on purpose to lure them to her. Once her gingerbread house accomplished its purpose and lured Hansel and Gretel, the wicked witch continued her mothering: "Ah, dear children, who brought you here? Come in and stay with me. You shall come to no harm." She took them by the hand and led them into the little house. A nice dinner was set before them: pancakes and sugar, milk, apples, and nuts. After this she showed them two little white beds into which they crept, and they felt as if they were in heaven . . .

Id. at 337.

111. *Id.*

112. "Witches have red eyes and can't see very far, but they have keen noses like animals and can scent the approach of human beings." *Id.*

The initial question must be whether mothering beyond infancy confers a benefit at all. Surely, as mothering becomes less necessary, it does not necessarily become valueless. As children outgrow the need for diapers, rational mothers do not persist in diapering them but direct their mothering efforts elsewhere — into planning and preparing family meals,¹¹³ editing high school English papers, transporting children to ballet and swimming and soccer practice, raising money for football helmets, cleaning, laundering, tutoring, baking, shopping, and stocking underwear drawers. If a mother performed these labors for an employer no one would question whether the employer received a benefit. When she performs similar labors for her family, her actions also confer benefits, regardless of whether they are actually necessary. The point here is certainly not that mothers *should* do these things, but only that doing them confers a benefit.¹¹⁴

Of course, not all that is beneficial is valuable in the economic sense. The real concern may not be that post-infancy mothering confers no benefit, but rather that it is inefficient. The question thus becomes: at what point on the continuum of a child's life do the costs of mothering exceed its benefits? When do the inefficiencies of work directed at an individual family (that does not actually *need* much mothering) warrant the conclusion that a mother should focus on the market instead, i.e., get a job or a job with more hours, and that her failure to do so must be a product of excessive mothering? Difficult questions follow: What are the costs (to a mother, to her family, to society) of mothering or of market engagement in lieu of mothering? What are the benefits (to a mother, to her family, to society) of mothering or of market engagement in lieu of mothering? What are the costs and benefits (to a mother, to her family, to society) of a mother's "balancing" home and market labor in various ratios? Obviously, some answers are easier to quantify than others. Consider the fictional case of Ms. Weber:

It is a cold night in the middle of the winter of 1987. Sleet is falling in a thick film and the streets are deserted. Anthony and Julia walk down Twenty-second Street between First and

113. See generally Marjorie L. DeVault, *Doing Housework: Feeding and Family Life*, in *FAMILIES AND WORK* 178 (Naomi Gerstel & Harriet Engel Gross eds., 1987).

114. One of the most significant teachings of feminism is the value of freedom to choose — to control one's own body, to hold property, to vote, to pursue an education, to work in the market. To the extent economic fortune allows, a woman should also be free to choose to work in her home. Of course, not all mothers who prioritize home-making have made a voluntary choice to do so. Naomi Cahn has observed "constraints on women's lives such that they appear to choose a life of household duties and to conserve power within that sphere, when, in fact, the choice is rigged." Cahn, *supra* note 33, at 180.

Second avenues and turn onto the tree-lined block called Gramercy Park East. Number 120, an old synagogue housing a small shelter for the homeless . . .

"I come here with my wife," [Mr. Weber] says, nodding in the direction of a small, dark woman still engaged in preparing her belongings for the night. She takes a blue bathrobe from her shopping bag, folds it in her lap, then pulls one out for her husband and lays it across the pillow, which she fluffs up before turning down the sheet. Carrying two white towels and a large plastic bag filled with soaps and creams, she walks out of the room as if she is alone and busy in her own home, as if there are not a dozen people seated at tables, many of them watching her intimate preparations for the night.¹¹⁵

Ms. Weber's acts are small things: fluffing a husband's pillow, turning down his sheet, laying out his bathrobe. What are the costs and benefits of such actions? Not much cost evidently because Ms. Weber's efforts require only a few minutes. Unless, of course, she has arthritis or passed up work at McDonald's or McGraw Hill or Lehman Brothers to be there with her husband. As for benefits, Mr. Weber is hardly a baby; he is not even a child and certainly does not need anyone to fluff his pillow. Maybe he does not appreciate his wife's efforts much, having grown accustomed to them. If she had forgone her attentions this night, would costs have followed? Would Mr. Weber have been saddened by her absence or her inattentiveness? If there is not much benefit here, maybe there is still enough to outweigh the negligible cost.

Market tools fail to capture that even small acts of mothering can confer great benefit. My Grandma would bring tea in a flowery china cup to soothe my tummy ache. If Grandma had been at work, she would not have been there to see my pain. Was she an excessive Grandma? As a teenager I may have thought so, but even then I was taking in something from her attentions: you are valuable, this is how you care for others — little lessons that build on one another and persist much longer than Grandma's cup of tea. Market analysis seems an awkward tool with which to value the efforts of mothers, Grandmas, and Ms. Webers.

One thing seems clear, however, even without the help of market analysis. When Bobby boards the school bus for the first time, his mother's mandatory work load declines. But does Bobby's absence from 9:00 A.M. to 2:00 P.M. necessarily mean his mother should take a job from 9:30 A.M. to 1:30 P.M.? From 8:00 A.M. to 5:00 P.M.? What if the physical and emotional stress of being on her feet all

115. Jane Lazarre, *Fictions of Home*, in REPRESENTATIONS OF MOTHERHOOD, *supra* note 9, at 47, 50.

day or fighting office back-stabbing or appeasing angry clients makes Bobby's mother less efficient (and less caring) at home? How much time and energy does it take to mother well, to nurture a child, and to build a haven from the nastiness outside? Is a minimalist answer better than a generous one? Is there a one-size-fits-all answer?

If we cannot answer such questions with confidence, maybe we would be wise to defer to a mother's judgment about how much mothering is appropriate.¹¹⁶ Who can better understand what efforts will benefit her family and how much time those efforts require? A mother may be wrong in her assessment, but who has a better shot at being right? Not Bobby. And not third parties seduced by the myth that mothering is for babies.

B. The Law of The Excessive Mother

Too often the law, searching for The Excessive Mother, mistakes "unemployed" mothers of two-year-olds for wicked witches. The story begins with the normative vision of marriage as an egalitarian, companionate relationship in which both spouses make equal contributions to the market and the home. From this foundation flows the natural conclusion that all mothers either are or should be at work in the market, with perhaps a limited exception for mothers of very young children.

This understanding of the-way-things-are-supposed-to-be is dramatically evident in the laws governing imputation of income in child support cases. In all states, child support is calculated according to guidelines which generate a presumptively appropriate amount of support based on various factors.¹¹⁷ When a residential parent's income is one of the guideline factors and that parent has limited her market employment in order to care for children, the law may impute income to her for purposes of calculating child support.¹¹⁸ This income imputation effectively reduces the amount of child support and thus creates an incentive for the unemployed or underemployed residential parent to find appropriate employment. Of course, the effect of imputing income to a residential parent who does not respond by beginning or increasing her market work is simply to reduce the amount of support available to a child, a result that is starkly inconsistent with family law's general goal of protecting the best interests of children.¹¹⁹

116. One should continue to watch out, of course, for the truly terrible mother guilty of abuse or neglect.

117. See ELLMAN ET AL., *supra* note 47, at 459-60.

118. PRINCIPLES, *supra* note 12, § 3.15 (1)(a).

119. In most states, for example, custody is determined according to the best interest

So when do a child's needs allow a residential parent's increased employment and thus justify income imputation to a mother who is inappropriately underemployed? Early on, say some states. Deference to a caretaker's employment decision is appropriate, says Idaho, only until a child is *six months old*.¹²⁰ *Two years old*, say Alaska¹²¹ and Maryland.¹²² *Two and a half years old*, says Colorado.¹²³ *Three years old*, say Kentucky,¹²⁴ Maine,¹²⁵ and North Carolina.¹²⁶ *Five years old*, says Louisiana.¹²⁷ *Six years old*, say Massachusetts¹²⁸ and New Mexico.¹²⁹

Once a child reaches this identified age, income may be imputed to "enable" the gainful employment of a mother who has misjudged

of the child. *See, e.g.*, UMDA, *supra* note 11, § 402 ("The court shall determine custody in accordance with the best interest of the child."). *See* ELLMAN ET AL., *supra* note 47, at 564-65.

120. IDAHO CHILD SUPPORT GUIDELINES, § 6(c)(1), in IDAHO R. CIV. P. 6(c)(6) (2006) ("Ordinarily, a parent shall not be deemed underemployed if the parent is caring for a child not more than 6 months of age.").

121. ALASKA R. CIV. 90.3(a)(4) (2006) ("A determination of potential income may not be made for a parent who is physically or mentally incapacitated, or who is caring for a child under two years of age to whom the parents owe a joint legal responsibility.").

122. MD. CODE ANN., FAM. LAW § 12-204(b)(2) (LexisNexis 2004) ("A determination of potential income may not be made for a parent who . . . is caring for a child under the age of 2 years for whom the parents are jointly and severally responsible.").

123. COLO. REV. STAT. § 14-10-115(7)(b)(I) (2004)

If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income; except that a determination of potential income shall not be made for a parent who is physically or mentally incapacitated or is caring for a child under the age of thirty months for whom the parents owe a joint legal responsibility.

124. KY. REV. STAT. ANN. § 403.212(2)(d) (LexisNexis 1999) (noting that "a determination of potential income shall not be made for a parent who is physically or mentally incapacitated or is caring for a very young child, age three (3) or younger, for whom the parents owe a joint legal responsibility").

125. ME. REV. STAT. ANN. tit. 19-A, § 2001(5)(D) (1998) ("In the absence of evidence in the record to the contrary, a party that is personally providing primary care for a child under the age of 3 years is deemed not available for employment.").

126. N.C. CHILD SUPPORT GUIDELINES, Income (3), AOC-A-162, Rev. 10/02 at 3 (2002).

127. LA. REV. STAT. ANN. § 9:315.11 (A) (2000) ("If a party is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of his or her income earning potential, unless the party is physically or mentally incapacitated, or is caring for a child of the parties under the age of five years.").

128. MASS. PROB. & FAM. CT. R., Child Support Guidelines, Guideline II (1996)

If the court makes a determination that either or both parties is earning substantially less than he or she could through reasonable effort, the court may consider potential earning capacity rather than actual earnings. . . . This determination is not intended to apply to a custodial parent with children who are under the age of six living in the home.

129. N.M. STAT. ANN. § 40-4-11.1(C)(1) (LexisNexis 1999) (stating that "'income' means actual gross income of a parent if employed to full capacity or potential income if unemployed or underemployed. Income need not be imputed to the primary custodial parent actively caring for a child of the parties who is under the age of six or disabled").

how much mothering is appropriate. Of course not every court will not impute income to every mother of a child beyond the threshold age.¹³⁰ Still, the law's message is disturbingly clear: after a child reaches the age of six months, six years, or some age in between, a judge should assess whether a mother's decision to limit her market investment in order to mother is warranted in view of her market opportunities. At worst, a judge begins this cost/benefit appraisal of a mother's decision with the assumption that if a mother can earn more, she should earn more, since the law has already disqualified her from the statutory deference granted mothers of younger children.

The danger to mothers posed by the myth that mothering-is-for-babies is not limited to child support. The same reasoning that leads a court to reduce child support in order to coax a mother out of the home may lead a court to deny or limit alimony toward the same end.¹³¹ Consider the case of the long-term, full-time homemaker who has been out of the job market for many years. If mothers should be working in the paid economy once a child reaches age six months or six years, how can this homemaker justify the time she spent in full-time mothering beyond her children's early years? Surely, she must be an Excessive Mother. Superfluous. Lazy. Self-Indulgent. For some reason, she has behaved inefficiently, inappropriately, and therefore, any market costs that flow from such behavior are her fault and her responsibility. No long-term alimony for such an Excessive Mother, who needs a kick in the pants to get her off the sofa and into real, meaningful labor.

Similar reasoning endangers the younger mother who has compromised her market investment to care for children, either by temporarily dropping out of the market, or by working part-time or seasonally, perhaps in the secondary-job market in order to accommodate her caretaking. Unlike the long-term Betty Crocker, this mother's most potentially productive career years may lie ahead of her. Ample time for a judge to set her on the path to productive citizenship by encouraging her to become gainfully employed, i.e., by denying her alimony, or awarding her just enough to allow her education or retraining. Clearly, an alimony award sufficient to enable her to persist in excessive mothering would be very bad. The law of alimony, like the law of child support, thus invites judges to determine how

130. See, e.g., *PRINCIPLES*, *supra* note 12, § 3.15 (5) (in exercising its discretion to impute income to a residential parent whose child is age six or older, "the court should additionally consider the benefit, if any, accruing to the children of the parties from the residential parent's underemployment").

131. For a discussion of the key role of judicial discretion in alimony decision making, see *UMDA*, *supra* note 11 and accompanying text.

much mothering is “appropriate” or “excessive” — a frightening prospect for a mother facing a judge who thinks mothering is for babies.

C. *The ALI Response*

The ALI’s response to the myth of The Excessive Mother begins with identification of the norm of universal adult “labor-force participation.”¹³² While acknowledging the constraints childcare places on a caretaker’s ability to pursue paid employment, the ALI is clear that “child support rules [should] not discourage the residential parent’s labor-force participation.”¹³³ As the ALI explains:

During a child’s minority, the interests of all parties are generally best served by enabling the gainful employment of the residential parent to the extent consistent with the *needs* of the child. When the child has grown up, it is in the residential parent’s interest to have maximized the quality and quantity of past labor-force participation.¹³⁴

Imputation of income to a residential parent may be appropriate, says the ALI, when “the residential parent is not caring for a child of the parties *under the age of six . . .*”¹³⁵ Too bad for caretakers whose understanding of appropriate mothering conflicts with the myth that mothering is for babies.

132. See PRINCIPLES, *supra* note 12, § 3.03 cmt. d.

133. *Id.* § 3.04, cmt. e.

134. *Id.* § 3.04, cmt. e. The ALI makes clear that its reference to the “needs of the child” rather than a more generous standard such as the “best interests of the child,” or other standard focusing on benefit, was no accident. *Id.* While a child may benefit from parental attention, admit the drafters, fairness to the other parent may nevertheless requires a caretaker’s “gainful employment.” *Id.* Fairness to adults thus trumps the best interests of the child. For a commentary on the ALI’s child support scheme, see Leslie Joan Harris, *The ALI Child Support Principles: Incremental Changes to Improve the Lot of Children and Residential Parents*, 8 DUKE J. GENDER L. & POL’Y 245, 252 (2001).

135. PRINCIPLES, *supra* note 12, § 3.15(1)(a) (emphasis added). This section continues: “and is earning less than the parent could reasonably earn considering the parent’s residential responsibility for the children of the parties . . .” *Id.*

An Appendix to the child support chapter of the Principles contains an alternative formula with a supplementary award for low-income residential parents. Under § 3.052A, a presumption arises that limitation of market employment in order to care for children is appropriate when: “(a) the child is below the age of three; (b) three or more children are below the age of 10; (c) the child is disabled; (d) the cost of child care required by the residential parent’s employment would exceed resultant earnings.” *Id.* § 3.052 (A)(2). This presumption “may be overcome by proof that limitation of market labor is *inappropriate* or *excessive* in terms of the children’s needs.” *Id.* § 3.052A(3) (emphasis added).

IV. WHAT NOW — A PARTNERSHIP POSTSCRIPT

"He has nothing on at all," cried at last the whole people. That made a deep impression on the emperor, for it seemed to him that they were right; but he thought to himself, 'Now I must bear up to the end.' And the chamberlains walked with still greater dignity, as if they carried the train which did not exist.

— The Emperor's New Clothes¹³⁶

It is time to put aside mother myths. Mothering does not just happen; mothers are performing countless tasks in the daily work of child rearing and homemaking. Mothering is not free; mothers commonly pay a hefty market price for their home efforts. Mothering is not just for babies; mothers serve a valuable social function that improves the quality of life, far beyond the diaper and pre-school years. Debunking mother myths is not enough. It is also time to shed the peculiar egalitarian model of marriage these myths support, a model that falsely portrays real marriages and that confuses equality of status with identity of contribution.

Help in fashioning a better model of marriage comes, again, from partnership. Elsewhere I have argued that: partnership is an intuitive metaphor for marriage;¹³⁷ the language and principles of partnership help shed gender-determinative marital roles;¹³⁸ partnership offers a positive model for post-divorce income sharing that casts mothers as equal stakeholders in marriage rather than pitiable casualties of marriage;¹³⁹ an analogy to partnership buyouts provides a useful mathematical model for alimony;¹⁴⁰ and an analogy to unfinished partnership business supports a parenting-partnership model for income-sharing during the minority of minor children.¹⁴¹ Many partnerships, for example, involve a specialization of labor in which one partner contributes capital primarily or exclusively, while another

136. MICHAEL HAGUE'S FAVOURITE HANS CHRISTIAN ANDERSEN FAIRY TALES 441 (Lily Owens ed., 1981).

137. *Displaced Homemaker*, *supra* note 65, at 119-24.

138. *Mothers as Suckers*, *supra* note 53, at 1534-35.

139. *Id.* at 1527-38 (comparing a partnership model to the ALI's loss-sharing model).

140. *Displaced Homemaker*, *supra* note 65, at 124-38.

141. *Mothers as Suckers*, *supra* note 53, at 1544-52.

contributes services primarily or exclusively.¹⁴² Notwithstanding the partners' different contributions, partnership default rules provide that "all partners have equal rights in the management and conduct of the partnership business,"¹⁴³ and profits and losses are divided equally.¹⁴⁴ In practice, this default rule means that whatever the contribution of the individual partners, in the absence of an agreement otherwise, they are equal in status and equally entitled to any income either partner generates.¹⁴⁵

Like business partnerships, many marriages involve a specialization of labor in which one spouse primarily contributes capital and the other services. In a quasi-traditional marriage, for example, one spouse primarily contributes income through outside employment and the other primarily contributes household services, including child care. No matter whether marital roles are traditional, quasi-traditional, or truly egalitarian (both spouses assume full-time paid employment and fifty percent of household chores), the default rule should be that spousal partners are equal in status and equally entitled and obliged to share in the financial gains and losses produced by the marriage.

If, as Bradford Wilcox and Steven Nock report,¹⁴⁶ women are happiest in marriages with traditional divisions of labor, it is not because they have shed egalitarian attitudes, but because they do not associate unequal contributions to home labor with inferior status.¹⁴⁷ Perhaps these women understand something the law does not — that equality of status is not a function of equality of contribution, that even mothers who launder underwear can be equal partners in marriage.

142. See ROBERT W. HAMILTON, FUNDAMENTALS OF MODERN BUSINESS § 13.3.4 (1989).

143. UNIF. P'SHIP ACT § 18(e) (2001) [hereinafter UPA]; see also REVISED UNIF. P'SHIP ACT § 401(f). See generally DANIEL S. KLEINBERGER, AGENCY, PARTNERSHIPS, AND LLCs § 8.3 (2002).

144. UPA § 18(a).

145. Alicia Brokars Kelly has drawn an important connection between such a partnership scheme and community property regimes. See Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN'S L.J. 141, 173 (2004). This scheme is also consistent with Joan Williams's concept of a "family wage," although she does not endorse a partnership metaphor for marriage. See WILLIAMS, *supra* note 73.

146. See Wilcox & Nock, *supra* note 2.

147. See *id.* at 1328, 1331 (finding support for the hypothesis that "[t]raditional wives have lower expectations of marital equality in the division of household labor and emotional work; consequently they will be happier with their marriages, and the marital emotion work they receive, because they do not associate equity with equality") (emphasis added).

CONCLUSION

Family law's model of marriage as a companionate, egalitarian relationship in which spouses make equal or similar contributions to work and home does not reflect the reality of many marriages. The attractiveness of this simplistic model of equality lies partly in three supporting mother myths: mothering just happens, mothering is free, and mothering is for babies. Innocent as they may seem, these myths pose great danger for divorcing mothers by creating fictional baselines of appropriate behavior against which real mothers are judged. While the ALI has taken steps toward slaying portions of these myths, their ultimate demise depends on abandonment of the law's egalitarian model of marriage and adoption of a model that distinguishes between status and contribution. Such a model lies in the gender-neutral, equality-based principles and rules of partnership.

